No. 97-1374 (12)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

WILLIAM J. CLINTON, et al.,

Appellants,

v.

CITY OF NEW YORK, et al.,

Appellees.

ROBERT E. RUBIN,

Appellant,

v.

SNAKE RIVER POTATO GROWERS, INC., et al.,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia

BRIEF *AMICUS CURIAE* OF MARCI HAMILTON AND DAVID SCHOENBROD IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether the Line Item Veto Act violates Article I of the Constitution by delegating legislative lawmaking authority to the President?

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S. 433, 105th Cong. (1997) 19

Henry Julian Abraham, *Justices and Presidents* (1974) 15

Stephen G. Breyer, *The Legislative Veto After Chadha*, 72 Geo. L. J. 785 (1984) 19

Clinton Looks Elsewhere on Finance Reform, N.Y. Times, Feb. 28, 1998, at A7 21

Robert Dahl, *Democracy and Its Critics* (1989) 18

Editorial, *New Phone Tax*, Wall. St. J., Dec. 9, 1997, at A22 21

Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477 (1994) 23

Louis L. Jaffe, *An Essay on Delegation of Legislative Power (Part II)*, 47 Colum. L. Rev. 561 (1947) ... 19-20

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Congressman Nick Smith, *Restoration of Congressional Authority and Responsibility over the Regulatory Process*, 33 Harv. J. on Legis. 323 (1996) 19

Alexis de Tocqueville, *Democracy in America* (Phillips Bradley ed. 1946) 11

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 16-17

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PERMISSION TO FILE BRIEF AS *AMICI CURIAE*

Marci Hamilton and David Schoenbrod file this brief as *amici curiae* in support of Appellees, pursuant to Sup. Ct. R. 37.2. A letter of the Appellants, dated March 30, 1998, and letters of the Appellees, dated March 30, 1998 and March 30, 1998, by which counsel for the parties evidenced their consent to the filing of this *amicus curiae* brief, have been filed with this Court.

INTERESTS OF *AMICI CURIAE*

Professors Marci Hamilton and David Schoenbrod are law professors who specialize in constitutional and policy perspectives on legislative delegation. They are submitting this brief out of concern that the district court's reasoning unnecessarily complicates this Court's nondelegation doctrine. They are also concerned that this Court's nondelegation doctrine, though adequate to analyze and invalidate the Line Item Veto Act, has lost sight of its constitutional moorings.[1]

SUMMARY OF ARGUMENT

The Line Item Veto Act is a new approach in Congress's now habitual inclination to evade its lawmaking responsibilities by handing those responsibilities to the

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* disclose that they authored this brief in whole. No monetary contribution for the preparation or submission of this brief was made by any entity other than *amici curiae*.

Executive. Unlike earlier attempts to delegate, where Congress gave its lawmaking authority to the Executive so that the Executive would fulfill Congress's identified policy objectives, this Act gives the President authority unilaterally to *negate* Congress's chosen objectives. This new form in the evolution of congressional delegation plainly violates this Court's existing nondelegation doctrine. This case is an instance in which the Court's oft-criticized nondelegation doctrine can be employed consistently and coherently with its major constitutional premise that Congress holds sole responsibility to make the law.

The Framers crafted Article I to vest lawmaking power exclusively in Congress, and the early Supreme Court interpreted Article I to prevent Congress from delegating its lawmaking power to other branches. This Court believed correctly that establishing limits on Congress's ability to evade its responsibility to make the law was essential to democracy and liberty. After more than a century of adherence to the Framers' original intent, this Court constructed a new approach to delegation based on false empirical assumptions that has allowed Congress to evade democratic accountability and to weaken the protections of liberty inherent in Article I. This history is detailed in Parts II.A and B. Parts II.C and II.D of this brief argue that the time has come for this Court to return to the Framers' and this Court's original understanding and application of the nondelegation doctrine.

Whether this Court embraces its existing nondelegation doctrine or begins to craft a doctrine truer to its

constitutional origins, the Line Item Veto Act is unconstitutional.

ARGUMENT

I. THE LINE ITEM VETO ACT IS UNCONSTITUTIONAL UNDER THIS COURT'S NONDELEGATION DOCTRINE

Straightforward application of this Court's nondelegation doctrine makes clear that the Line Item Veto Act is unconstitutional. The district court's reasoning unnecessarily complicates the matter while the Government's defenses are unpersuasive.

A. The Line Item Veto Act Is Unconstitutional Under This Court's Settled Doctrine

Under this Court's existing doctrine, the Line Item Veto Act is an unconstitutional delegation of legislative lawmaking power.

This Court's nondelegation doctrine requires, at a minimum, that Congress identify its objective and that it provide guidance on how to achieve that objective if it delegates administration of the law to the Executive. *See, e.g., Loving v. United States*, 116 S. Ct. 1737, 1750 (1996); *Mistretta v. United States*, 488 U.S. 361, 371-73 (1988); *Yakus v. United States*, 321 U.S. 414, 426 (1944); *NBC v. United States*, 319 U.S. 190, 216-17 (1943); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932). The doctrine goes to the heart of Article I, the plain language

of which reposes lawmaking authority solely in Congress. *See* U.S. Const. art. I, § 1.

The Line Item Veto Act fails this test because it authorizes the President to negate the objectives that Congress has identified in its spending and tax legislation. The Act permits the President to "cancel" any dollar amount of any discretionary budget authority, any item of new direct spending, and any limited tax benefit. 2 U.S.C. § 691(a) (Supp. II 1996). By giving the President the power to repeal certain laws, Congress has given away the same Article I legislative power that it hands off when it gives agencies broad power to make the laws. The power to repeal a law, after all, is nothing more than a subset of the larger power to make laws. *See INS v. Chadha*, 462 U.S. 919, 954 & n.18 (1983) ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I. . . . There is no provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Art. I.") There is no question that the Constitution assigns Congress, not the President, the power to enact, and therefore, repeal tax and spending laws. *See* U.S. Const. art. I, §§ 7, 8. Thus, the Act necessarily implicates the nondelegation doctrine.

Because it gives the President the power unilaterally to erase duly enacted law, the Line Item Veto Act veers far from Congress's earlier delegation attempts. The Act is altogether different from the statutes articulating various "public interest" standards that the Court has upheld in earlier cases. *See* Br. for United States at 54-55. In those cases, this Court made explicit that Congress did significantly more than speak in general terms of the public interest, but rather also identified its objectives

and gave some guidance about how to achieve them. *See NBC*, 319 U.S. at 194, 225-26; *New York Cent. Sec.*, 287 U.S. at 25; *Lichter v. United States*, 334 U.S. 742, 778-86 (1948); *Yakus*, 321 U.S. at 420, 426-27; *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944). The Congress and the President presumably were engaged in a joint venture. The Act at issue in this case, however, does not delegate power over the means of achieving a particular end but rather gives the President the power to negate Congress's chosen ends unilaterally. *See* Lawrence Lessig, *Lessons from a Line Item Veto Law*, 47 Case W. Res. L. Rev. 1659, 1662 (1997) (characterizing the Line Item Veto Act as follows: "Congress says, 'Spend $50 million on pork.' The President says, 'Not.' Congress says, 'Give this important interest group a tax break.' The President says, 'Not.' ").

Delegation, if it can be defended at all, can only be defended if it is employed for the purpose of assisting Congress in the administration of its constitutional duty to make the law.[2] By handing the President the power to eliminate the law rather than the power to effect the law, the Line Item Veto Act is a more aggressive attack on the structure of the Constitution than any previous delegation. As Senator Ted Stevens, the lead Senate negotiator in the conference, acknowledged, in filing the Conference Report, the Act is "the most significant delegation of authority by Congress to the President since the Constitution was ratified in 1789." 142 Cong. Rec. S2929-02, at *2955 (March 27, 1996).

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[2] *See infra* Part I.C.

Even if it were constitutional for the President unilaterally to negate the laws made by Congress, the Line Item Veto Act fails this Court's nondelegation doctrine. This Court has held that Congress may delegate legislative lawmaking power only if the delegating statute provides an "intelligible principle" that guides the executive branch to carry out the will of Congress. *See Mistretta*, 488 U.S. at 371-73 (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). The Line Item Veto Act provides no intelligible principle to guide the President. He is empowered to repeal an item if he finds that doing so would

> (i) reduce the Federal budget deficit;
>
> (ii) not impair any essential Government function; and
>
> (iii) not harm the national interest.

2 U.S.C. § 691(a). The first requirement is a tautology and the second and third are all but contentless. These requirements are not "intelligible principles," but rather blatant prescriptions for independent executive branch lawmaking over the spending and taxing powers. The Act gives the President the very sort of uncabined power the Framers feared would lead to arbitrary and capricious rule. *See, e.g.*, James Madison, *Notes of Debates in the Federal Convention of 1787*, at 47, 63, 312 (Ohio U., 1981).

B. The District Court's Reasoning Unnecessarily Complicates This Case

The district court makes the case unnecessarily difficult. It does not apply the "intelligible principle" rule

because it claims that the Act delegates "non-delegable legislative authority" by empowering the President to "make permanent changes to" a law. *City of New York v. Clinton*, 985 F. Supp. 168, 181 (D.D.C. 1998). Apparently, the court below believed that the Act differs from previous delegations because it gives the President the power to alter a law permanently. The permanence of the President's cancellation power, however, is not a distinction that makes a difference under the nondelegation doctrine.

The district court's attempt to distinguish the Line Item Veto Act from agency delegations on the ground that it gives the President a power to change the law permanently is unavailing. The permanence of the executive alteration of the legislature's policy choice should make no difference under Article I. For example, Congress has delegated authority in a way that permits the delegate to make decisions that are permanent or difficult to change. *See, e.g., Field v. Clark*, 143 U.S. 649, 683-92 (1892); *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1477-78 (D.C. Cir. 1998). It is not clear that the permanent aspect of the cancellation power under the Act is more troubling than delegations in which agencies can amend their initial determinations. The constitutional evil in the Line Item Veto Act is that the President unilaterally can *negate* a legislative policy determination, not that the President can negate it permanently. The type of harm rendered to the purposes of Article I--to ensure democratic accountability and to protect liberty--is the same whether the President permanently cancels under the Line Item Veto Act, or the President or an appointee promulgates a regulatory law or tax subject to future revision by administrative fiat.

Indeed, the danger to liberty may be even greater when the agency willy-nilly can change its regulatory laws. That is a prime example of arbitrary lawmaking. Thus, the power to make only one change (the power to cancel) may be marginally better than the power to make a series of changes. This is not to argue in favor of the Act by any stretch, but rather to point to the fallacy at the heart of the district court's reasoning that the chief constitutional evil of the Act is the permanency of the President's action. Although the district court reaches the right result, it errs by eschewing this Court's settled nondelegation doctrine in favor of a distinction without a difference.

C. The Federal Government's Defense of the Line Item Veto Act Under This Court's Precedents Is Unpersuasive

The United States vainly tries to pour content into the Act's empty standards by pointing to its provisions instructing the President to consider the legislative history, to provide an estimate of the economic and social effects of a cancellation, and to set forth the geographic distribution of canceled spending. *See* Br. for United States at 57 (citing 2 U.S.C. § 691a(b)). Yet, neither the legislative history nor the information requirements provide *standards* for decision. Instead, they instruct the President to follow a *process* in exercising the lawmaking powers delegated to him. Article I requires Congress at a minimum to state its policy goals. This Act fails even that minimum requirement.

The United States also makes much of various statutes that let the President spend less than the full sums appropriated, apparently on the reasoning that the Line Item Veto Act does nothing more than permit the President to refuse to spend the appropriated funds. *See id.* at 2-7, 51-54. With all due respect, the United States is confusing apples with oranges. The power to spend less than appropriated for the purpose of serving legislatively identified policies is not the same as the power to negate the Congress's policy objective. The former is an Article II executive function. When Congress authorizes the President to spend up to a certain sum for a designated purpose, it has made the legislative policy choice. The Line Item Veto Act lets the President reject Congress's purpose altogether and thus permits the President to undo the legislative policy choice, rather than effect it.

Congress has provided standards for the exercise of its spending authority that are far more substantial than those provided in the Line Item Veto Act. For example, past versions of the Anti-Deficiency Act permitted the President to "provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operation, or other developments subsequent to the date on which such appropriation was made available." 31 U.S.C. § 665(c)(2)(1970). Indeed, when Congress concluded that President Nixon had abused the phrase "other developments," it repealed that phrase, making the provision more restrictive.

In light of this Court's existing nondelegation doctrine, a decision in this case to invalidate the Line Item Veto Act can be quite straightforward.

Notwithstanding the utility of this Court's nondelegation doctrine for this case, *amici* believe that the doctrine has validated too many unconstitutional delegations and contributed to the current unacceptable state of affairs, wherein the Congress has become overly comfortable shifting its Article I lawmaking responsibilities to unaccountable agencies. *See infra* Part II.C. The following discussion is offered for the purpose of providing a meaningful context within which to understand the nondelegation doctrine's history, application, and importance.

II. A FRAMEWORK FOR CONSIDERING CONGRESSIONAL DELEGATION AND THE NONDELEGATION DOCTRINE

The nondelegation doctrine is firmly rooted in the Constitution, and this Court long considered it a serious, enforceable requirement. The modern cases have created stark inconsistencies in the case law and rendered the nondelegation doctrine ineffectual at achieving its core purposes of preserving democracy and protecting liberty. There is no good reason to allow this deviance from constitutional principles to continue. Congress, the President, and this Court all bear responsibility to repair current practices. The part that falls to this Court is to explain that the Constitution limits the power of elected lawmakers to shrug their lawmaking responsibility onto unelected officials.

A. The Nondelegation Doctrine Has a Long Pedigree as a Fundamental and Enforceable Part of the Constitution

The Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress. . . ." U.S. Const. art. I, § 1. From the earliest days of the Constitution, there is ample evidence demonstrating that both the Framers and this Court believed that representatives should be required to make the hard policy choices. *See Ludecke v. Watkins*, 335 U.S. 160 (1948) (discussing Alien Act of 1789); *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388-89 (1813); *The Virginia Report of 1799-1800, Touching of the Alien and Sedition Laws, Together with the Virginia Resolutions of December 21, 1798*, at xv, 23 (Leonard W. Levy ed. 1970); Alexis de Tocqueville, *Democracy in America* 57-58 (Phillips Bradley ed. 1946); *see also* David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 30-33 (1993) (discussing examples from 18th and 19th centuries). This Court took the nondelegation principle seriously.

The legislative power in Article I is to make rules of private conduct. Chief Justice Marshall made that clear in *Fletcher v. Peck:* "[It] is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." 10 U.S. (6 Cranch) 87, 136 (1810); *see also Loving v. United States*, 116 S. Ct. 1737, 1744 (1996); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222 (1995).

According to this understanding of Article I, Congress alone may make rules that govern private persons.

Congress can leave to other branches the interpretation and application of those rules, as well as functions that are not within Article I legislative powers, such as the management of government departments and property. *See* Schoenbrod, *supra*, at 180-191 (discussing the application of this test). Such a standard of unconstitutional delegation is consistent with the purposes of Article I. Branches other than the legislative will face hard decisions in, for example, interpreting statutes and in exercising prosecutorial and remedial discretion. Legislators, however, must face the hard legislative policy choices and take responsibility for their resolution. In stating rules of conduct, the legislature cannot simply promise the best of everything to everyone, but rather must make manifest the costs, as well as the benefits, of its actions. *See generally id.* at 183-84, 186-89.

Before 1890, Congress did not routinely delegate its legislative powers. Around 1890, legislative practice began to change. According to an eminent historian, Professor Robert H. Wiebe, this shift sprang from basic changes in the economy and politics. *See* Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (1995). While power had previously resided principally in the institutions centered on the Main Streets of America, from 1890, nationally oriented institutions, such as nationally oriented businesses, unions, associations, and universities, took on increasing importance. *See id.* at 138-61. These national institutions were run by a new managerial class, trained in what was thought of as scientific methods. *See id.* at 143. Its members believed that scientific managers should not have to account to lay people. *See id.* This class set out to insulate government

from the lower class's influence by various devices, including poll taxes, literacy tests (applied to the lower class of all races), and the delegation of legislative power to expert agencies. *See id.* at 134-37, 164-65, 173-80, 206-07, 217-22.

Because they distinguished expertise from policymaking, many members of this managerial class did not characterize agencies as exercising legislative power. This class was so infatuated with science as the universal solution to policy problems that it seems to have believed that agencies were following instructions rather than making law. For this reason, many zealous supporters of expert agencies could also think of themselves as supporting separation of powers. Thus, from 1890 through the 1920's, as Congress started to delegate, this Court upheld some delegations on the basis that they gave the agencies the power to implement law rather than make it. *See* Schoenbrod, *supra*, at 31-36 (listing cases).

This Court also invalidated some laws for delegating power unconstitutionally. On at least three occasions prior to 1928, this Court struck statutes on delegation grounds. *See Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter, amend, or revise the maritime law" to states); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87-88, 92-93 (1921) (holding that a vague statute "amounted to a delegation by Congress of legislative power to courts. . . ."); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (holding improper delegation of maritime law to the states).

In 1928, this Court upheld a tariff statute under a new test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr. & Co. v. United* States, 276 U.S. 394, 409 (1928). The "intelligible principle" in that case provided only limited direction so that the statute, in fact, delegated legislative power. Although a true believer in scientific government, President-elect Herbert Hoover reacted angrily with the following separation of powers analysis:

> The American people will never consent to delegating authority over the tariff to any commission, whether non-partisan or bi-partisan. Our people have a right to express themselves at the ballot upon so vital a question as this.
>
> There is only one commission to which delegation of that authority can be made. That is the great commission of their own choosing, the Congress of the United States and the President. It is the only commission which can be held responsible to the electorate.

With Our Readers, 13 *Const. Rev.* 98, 100 (1929) (quoting President Hoover's speech of Oct. 15, 1928). According to an editorial in the *Constitutional Review*, the statute upheld in *Hampton* "was the most dangerous advance in bureaucratic government ever attempted in America." *Id.* at 101.

Despite the broad and troubling language of *J.W. Hampton*, it was used by this Court to invalidate New Deal laws that evidenced the tremendous increase in the

scope of delegation. Justice Cardozo, concurring in a unanimous decision to strike the National Recovery Act, called it "delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935). The constitutional potential in the *J.W. Hampton* rule is emphasized by the 9-0 and 8-1 votes finding Congress's delegation unconstitutional in *Schechter Poultry*, *id.* at 551, and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935), respectively.

B. The Supreme Court's Recent Delegation Jurisprudence Is Inconsistent

President Franklin Roosevelt's court-packing plan, and not intellectual persuasion, softened the Court's resolve to invalidate congressional delegations. *See* Henry Julian Abraham, *Justices and Presidents* 198 (1974). While the "intelligible principle" test announced in *J.W. Hampton* has been read appropriately to mean that Congress must state the rules of conduct, *Panama Refining Co.*, 293 U.S. at 421,[3] it has generally come to mean that it is sufficient for Congress to state only its goals even as it ducks the hard policy choices. *See, e.g., Mistretta*, 488 U.S. at 372-73; *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 574 (1939).[4] While this Court has recognized that Congress can recite goals, yet avoid the hard choices, it has not taken the lead in identifying unconstitutional

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[3] *See also Yakus v. United States*, 321 U.S. 414, 424-25 (1944).

[4] This is the weakness in the Court's doctrine that the federal government attempts to exploit to preserve the egregious delegation found in the Line Item Veto Act. *See* Br. for United States at 54-55.

delegations. *See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 631-41 (1980); *id.* at 686-88 (Rehnquist, J., dissenting).

Still, the nondelegation doctrine has retained some vitality. Various coalitions of justices have struck particular agency laws on nondelegation principles. For example:

- *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116-17 (1976), struck a statute for delegating to the Civil Service Commission the power to make a law preventing legal aliens from holding civil service jobs. *See id.* at 122 (Rehnquist, J., dissenting).
- *INS v. Chadha*, 462 U.S. 919 (1983), struck hundreds of statutes that delegated to one or two houses of Congress the lawmaking power delegated by the Constitution to the Article I legislative process. *See id.* at 986-87 (White, J., dissenting).
- Void for vagueness cases not only require that the public be given notice of what is forbidden, but deny to executive officials the power to make law. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).[5]
- Various cases have struck city ordinances and state or federal statutes delegating overly broad discretion to regulate or punish speech or religion. *See generally* Laurence H. Tribe, *American Constitutional Law* §§ 12-38 (2d ed. 1988).
- Various cases have interpreted statutes to avoid perceived delegation problems, although the net effect is that the courts made the legislative policy decisions not made by Congress. *See, e.g., American Petroleum Inst.*, 448 U.S. at 646; *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974).

[5] The void for vagueness doctrine applies to civil as well as criminal offenses, *see Jordan v. De George*, 341 U.S. 223, 231-32, *reh'g denied*, 341 U.S. 956 (1951), and statutes that delegate to agencies often make violations of agency created laws a criminal offense.

Although this Court has struck agency laws on delegation grounds in many special circumstances, it has generally affirmed delegations in which Congress has not made the hard choices. *See, e.g., Mistretta*, 488 U.S. at 422 (Scalia, J., dissenting); *Rock Royal Co-op*, 307 U.S. 574-76 (upholding statute that delegated authority to make regulations to create "orderly" markets while taking the interest of consumers into account). Thus, the main harm to representative democracy arising from delegation continues.

C. There Is No Good Rationale for Unconstitutional Delegation

A variety of rationales have been advanced to justify delegation, none of which mitigates its constitutional defects. One rationale is that the agencies are experts, and Congress is not. As an empirical matter, however, the hard choices delegated are, at bottom, questions of policy rather than technical questions best resolved by experts. A leading political scientist, Professor Robert Dahl, argues that

> [n]o intellectually defensible claim can be made that policy elites (actual or putative) possess superior moral knowledge or more specifically superior knowledge of what constitutes the public good. Indeed, we have some reason for thinking that specialization, which is the very ground for the influence of policy elites, may itself impair their capacity for moral judgment. Likewise, precisely because the knowledge of the policy elites is specialized, their expert knowledge ordinarily provides too narrow a base for the instrumental judgments that an intelligent policy would require.

Robert Dahl, *Democracy and Its Critics* 337 (1989). Congress need not delegate to take advantage of expertise. It can call on its own technical experts as well as experts in agencies. Moreover, the legislative branch is best suited for broad-ranging factfinding. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997); *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174, 1191 (1997).

A second common rationale for delegation is that it is a necessity of modern government because of the volume of work. This rationale is circular. By skewing legislators' political incentives, failure to enforce the nondelegation doctrine encourages Congress to send more and more issues through the federal bureaucracy.

Although the inflation of the regulatory state does not justify delegation, it must be faced in considering whether it can be ended. The question is best left to Congress. One sensible approach among others that Congress could take is described in an article by Justice Breyer in which he suggested that Congress could respond to the decision in *INS v. Chadha*, 462 U.S. 919

(1983), by enacting a statute requiring that agency regulations be enacted through the legislative process rather than promulgated as agency rules. Stephen G. Breyer, *The Legislative Veto After Chadha*, 72 Geo. L. J. 785 (1984). He offered many variations on this approach, such as an expedited legislative process, *id.* at 793-94, which would take less time than judicial review of agency regulations. Justice Breyer's ideas have prompted bills by Congressman J. D. Hayworth and Senator Sam Brownback. H.R. 1036, 105th Cong. (1997); S. 433, 105th Cong. (1997).[6] Another approach would be for Congress to take responsibility for at least the major rules. *See, e.g.*, Congressman Nick Smith, *Restoration of Congressional Authority and Responsibility over the Regulatory Process*, 33 Harv. J. Legis. 323 (1996); Paul R. Verkuil, Comment, *Rulemaking Ossification: A Modest Proposal*, 47 Admin. L. Rev. 453, 457-59 (1995).

A third rationale for refusing to enforce the nondelegation doctrine is the argument that courts lack a judicially manageable test. The Court's current test, requiring an "intelligible principle," provides no bright line, but it is no less manageable than most constitutional standards. As Professor Louis Jaffe, a prominent defender of delegation wrote of the "intelligible principle" test, "nearly every doctrine of constitutional limitation has been attacked as vague. Essentially the charges go to the institution of judicial review as we have it rather than specifically to the delegation doctrine." Louis L. Jaffe, *An*

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[6] So far, the bills have 68 sponsors in the House and 13 in the Senate.

Essay on Delegation of Legislative Power (Part II), 47 Colum. L. Rev. 561, 577 (1947).

There are two powerful reasons for believing that taking the "intelligible principle" test seriously would actually reduce the Court's involvement in legislative policy choices. First, the truth is that this Court has enforced the non-delegation doctrine selectively and inconsistently. Justices with diverse viewpoints have often expressed concern that the Court's nondelegation doctrine is contradictory. *See, e.g., Smith*, 415 U.S. at 591-604 (Rehnquist, J., dissenting); *Hampton*, 426 U.S. at 112 (Rehnquist, J., dissenting); *American Petroleum Inst.*, 448 U.S. at 717-18 n.30 (Marshall, J., dissenting); *National Cable Television Ass'n*, 415 U.S. at 352-54 (Marshall, J., dissenting); *Chadha*, 462 U.S. at 986-87 (White, J., dissenting); *see also* Schoenbrod, *supra*, at 40-45, 181. This case offers the Court the opportunity to place its nondelegation doctrine on a more internally consistent and less political plane.

Second, as Justice Scalia wrote:

> the argument may be made that in modern circumstances the unconstitutional delegation doctrine, far from permitting an increase in judicial power, actually reduces it. For now that judicial review of agency action is virtually routine, it is the courts, rather than the agencies that can ultimately determine the content of standardless legislation.

Antonin Scalia, *A Note on* the Benzene Case, 4 Reg. 25, 28 (July-Aug. 1980); *see also* Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1120 (1977).[7] Content review rather than nondelegation review puts the courts directly in the center of controversial policy decisions because it falls to the courts to review the hard policy choices made by agencies.[8] By enforcing the nondelegation doctrine and asking only the question of *whether* Congress made the law (rather than the question regarding the quality of the law), this Court would in fact reduce its involvement in matters properly left to the legislative process.

Although the Court can dispose of this case under the current "intelligible principle" test, we believe that it is not the best test of unconstitutional delegation. *See* Schoenbrod, *supra*, at 157-58, 180-81. The Court would better serve the fundamental purposes of the nondelegation doctrine--to preserve democracy and protect liberty--if it went back to the original concept of legislative rule.

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[7] Judicial deference to agency lawmaking reduces judicial policy making, but only at the price of making even more fictional the notion that the agency is directed by statute.

[8] *See, e.g., Coyne Bheam, Inc. v. FDA*, 966 F. Supp. 1374 (M.D.N.C. 1997) (discussing White House proposals for the Food and Drug Administration to regulate tobacco); *Clinton Looks Elsewhere on Finance Reform*, N.Y. Times, Feb. 28, 1998, at A7 (recounting how President Clinton had sent the Federal Election Commission and the Federal Communications Commission messages asking the former "to end the use of soft money, and asking the [latter] to do more to provide air time free or at lower cost to candidates" after campaign finance reforms were defeated in the Senate); Editorial, *New Phone Tax*, Wall. St. J., Dec. 9, 1997, at A22 (describing how the Federal Communications Commission is ultimately passing onto consumers a hidden tax in order to finance the vague mandate in the 1996 telecommunications bill to give every school and library access to the Internet).

The Framers and the early Supreme Court thought it was Congress's job to make the law. In the Court's view, the legislature was to make the rules of conduct, not just state the policy goals. *See supra* Part II.A. The present case does not require the Court to decide whether to improve upon the "intelligible principle" test because the Line Item Veto Act is clearly unconstitutional under either the Court's original test or its now existing test, but it does give this Court an opportunity. The Court need not fear that it is acting alone. Unlike in the days of the Court packing plan, Congress is now looking for ways in which it can once again assume its constitutional responsibility to make the hard choices. Congress has stepped forward to begin grappling with the delegation problem with recently enacted legislation, *see* 5 U.S.C. §§ 801-08 (Supp. 1997) (expediting congressional review of agency rules), as well as the pending legislative proposals previously discussed.

D. The Court, Congress, and the President Share Equal Responsibility To Hold the Line on Delegation

The burden of upholding the Constitution is not the Court's alone. *See Boerne*, 117 S. Ct. at 2172. The Congress has a constitutional obligation as strong as the Court's to keep delegation in line. As Justice Kennedy, joined by Justice O'Connor, stated in his concurring opinion in the decision in *United States v. Lopez*,

> it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.
>
> At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.

514 U.S. 549, 577-78 (1995). On the Court's side, this Court's decisions in *Lopez*, *Boerne*, *Printz v. United States*, 117 S. Ct. 2365 (1997), and in particular its discussion of delegation in *Loving*, signal that the Court is now embracing its constitutional duty to provide meaningful boundaries to the limited powers accorded Congress by the Constitution. This readiness to treat the separation of powers with some seriousness is the surest path to liberty. *See Boerne*, 117 S. Ct. at 2168, 2172.

In principle, this Court has always agreed that Article I limits the power of Congress to delegate its responsibility to make the law. *See Loving*, 116 S. Ct. at 1744; *Mistretta*, 488 U.S. at 371-72; *Schechter Poultry*, 295 U.S. at 529-30; *Panama Refining Co.*, 293 U.S. at 421; *Field*, 143 U.S. at 692; *see also* Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477, 544-54 (1994) (discussing independent decision-making responsibility of legislators). The people, no less than Congress, have a right to hear the Court explain how the Constitution requires Congress and the President to be accountable by taking responsibility for the laws that

government imposes on the public. This Court should continue its commitment to this core structural constitutional requirement by applying, clarifying, and buttressing the nondelegation doctrine in this case to invalidate the Line Item Veto Act.

CONCLUSION

Article I of the Constitution prevents Congress from abdicating its responsibility to make the hard policy choices. If the Court fails to invalidate those laws in which Congress abdicates its central constitutional role, this Court will have deprived the people, the States, and the Congress of the guidance necessary to bring legislative practices within the constitutional fold. Accordingly, *amici curiae* urge this Court to hold that the Line Item Veto Act is an unconstitutional transfer of lawmaking authority from the Congress to the President.

Respectfully submitted,

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